In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 851

DAVID J. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3–20) is reported at 367 F. 2d 72.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1966. On November 9, 1966, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 12, 1966, and on December 10, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1965 amendment to 50 U.S.C. App. 462(b)(3), making it a crime knowingly to destroy

a Selective Service certificate, is a constitutional exercise of Congressional power.

STATUTE INVOLVED

50 U.S.C. 462(b)(3), Section 12(b)(3) of the Universal Military Training and Service Act, as amended by 79 Stat. 586 (1965), provides:

> (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451, 453, 454, 455, 456 and 458–471 of this Appendix), or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates,* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this

title. (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Amendment italicized.]

STATEMENT

A street rally was held with police authorization on October 15, 1965, in New York City near the United States Army Induction Center for the purpose of protesting United States foreign policy and the military draft (R. 22a, 38a, 40a, 44a, 477a).[1] Petitioner was one of the speakers at the rally. At the conclusion of his remarks and as the climax thereof, petitioner took out his Selective Service Notice of Classification and burned it in full view of the audience (R. 24a, 30a, 48a, 69a, 82a). Petitioner did not encourage others to follow his example nor did any other person burn his draft card at the meeting (R. 51a, 52a, 59a). Three days later petitioner was arrested (R. 70a). After waiving trial by jury, petitioner was convicted in the United States District

[1] "R." refers to Appellant's Appendix to his brief in the court of appeals.

Court for the Southern District of New York of knowingly destroying a Selective Service certificate in violation of Section 12(b)(3) of the Universal Military Training and Service Act, as amended on August 30, 1965, 79 Stat. 586 (pp. 2–3, *supra*). On March 15, 1966, petitioner was sentenced to a suspended three-year term of imprisonment and placed on probation for two years subject to the special conditions that he obtain and carry within two weeks a Selective Service Notice of Classification and obey the orders of his Selective Service Board (Pet. App. 22). The court of appeals affirmed.

ARGUMENT

1. One of petitioner's contentions is that the 1965 amendment here at issue, 79 Stat. 586, is unrelated to any rational legislative purpose and therefore violates the Fifth Amendment (Pet. 19). The statute does not, however, suffer from this infirmity because it is, on its face, a reasonable measure designed to facilitate the operation of the Selective Service System.[2] Selective Service certificates such as the Notice of Classification (the document which petitioner destroyed) serve useful purposes in administering the system. They facilitate communications between the holder and his local board by keeping him aware of his Selective Service number, his board's address, and his current status. They enable him to prove his draft status and remind him of his legal obligation to notify his local board of changes in his personal

[2] The power "[t]o raise and support Armies," conferred by Art. I, Sec. 8 of the Constitution, plainly authorizes Congress to establish and implement the Selective Service System.

circumstances which might alter his current classification or require changes in official records. The Notice of Classification could also aid in reconstructing a local board's files if they were ruined by some catastrophe. It also contains sufficient information to enable a local board which is not the one where the holder is registered to assign him to duty in the event of an extreme national emergency. See Forkosch, *Draft Card Burning—Effectuation and Constitutionality of the 1965 Amendment,* 32 Brooklyn L. Rev. 303, 323–325 (1966).

Well before draft-card burning became a means of protest, the Selective Service System had, by regulation, required registrants to carry their draft notices at all times. 32 C.F.R. § 1617.1. The regulation imposing that duty had been held constitutional. *United States* v. *Kime,* 188 F. 2d 677 (C.A. 7), certiorari denied, 342 U.S. 823. The very same reasons which justify the requirement that a person keep the certificate in his possession sustain legislation reasonably calculated to implement that obligation—*i.e.,* a statute making it a crime to destroy the card.

2. Petitioner's First Amendment contentions must be considered in the light of the above justification for the judgment that burning of certificates should be prohibited. The thorough opinion of the court below demonstrates persuasively (Pet. App. 8–20) that, so considered, the claim of infringement of First Amendment rights is unsound.

a. Petitioner contends that the statute is invalidated by legislative history showing that its purpose was the suppression of political dissent (Pet. 2). Cer-

tain statements on the floor of Congress appear to support this claim (see 111 Cong. Rec. 19871), but the Committee Reports in both the House and Senate (S. Rep. No. 589, 89th Cong., 1st Sess.; H. Rep. No. 747, 89th Cong., 1st Sess.) do not manifest a legislative intent to suppress speech or any other form of expression. Moreover, it is clear from decisions of this Court that the bill must be sustained if Congress has the constitutional power to enact it, irrespective of the motives for its passage.[3] *United States* v. *Doremus*, 249 U.S. 86, 93; *Barenblatt* v. *United States*, 360 U.S. 109, 132; *United States* v. *Kahriger*, 345 U.S. 22, 27–29; see *Daniel* v. *Family Security Life Ins. Co.*, 336 U.S. 220, 224.

b. Petitioner also contends that, on the particular facts of this case, the burning of his draft card constituted "symbolic speech," and that it was, therefore, impermissible under the First Amendment for him to be criminally prosecuted for such conduct (Pet.

[3] None of the several cases invoked by petitioner (Pet. 12–15) is to the contrary. Most—*e.g.*, *Lane* v. *Wilson*, 307 U.S. 268; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; and *N.A.A.C.P.* v. *Patty*, 159 F. Supp. 503 (E.D. Va.)—hold only that the effect of a statute seemingly passed in pursuance of constitutional authority may be scrutinized to see whether the Act is, in fact, consistent with the Constitution. Two other cases—*Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, and *Gomillion* v. *Lightfoot*, 364 U.S. 339, hold that legislative history may be examined to determine whether a statute is really what it purports to be (*Bailey*—law denominated a tax really a penalty designed to prohibit use of child labor; *Gomillion*—Act purporting to be a redefinition of municipal boundaries really an attempt to disenfranchise Negro residents of city). But no case which we have found stands for the proposition advanced by petitioner that improper motive alone may render a federal statute unconstitutional.

15). Granting, as the court of appeals did (Pet. App. 14), the accuracy of petitioner's characterization of his acts, they did not thereby become immune from criminal prosecution. At best, the "symbolic speech" in which petitioner engaged was one of the "forms of conduct mixed with speech [that] may be regulated or prohibited" (*Cox* v. *Louisiana*, 379 U.S. 559, 563) when a legitimate governmental interest is at stake. Here, as we have demonstrated, petitioner's conduct was of a kind which the federal government had ample reason to prohibit. Petitioner is no more entitled to claim that his conduct is entitled to constitutional immunity than is an individual who, for similar "symbolic" reasons, refuses to file an income-tax return or to report for military service. Compare *People* v. *Stover*, 12 N.Y. 2d 462, 191 N.E. 2d 272, appeal dismissed for want of a substantial federal question, 375 U.S. 42, which sustained the conviction, under a municipal ordinance, of an individual who hung rags on a clothesline abutting the street as a protest against high property taxes.

c. Finally, there is no merit to petitioner's claim that this case presents the broad question of whether the "clear and present danger" test or the "balancing" test applies "in reviewing Governmental action in the area of the First Amendment" (Pet. 18–19). The court of appeals did not hold that "this Court no longer applies the clear and present danger test" (Pet. 3); it held only that when a statute "indirectly restrict[s] speech"—when it "regulates conduct, not the communication of ideas" (Pet. App. 15–16)—this Court has determined its constitutional-

ity by weighing the incidental impact on communication against the conflicting governmental interest. The question presented here is unlike the issues in cases where the clear and present danger doctrine has been applied. *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624; *Thornhill* v. *Alabama,* 310 U.S. 88; and *Stromberg* v. *California,* 283 U.S. 359, concerned constitutional challenges to statutes which were directly aimed at expression by conduct, and where the conduct itself had no harmful effect other than in its communicative aspect. The statute involved here is, as we have shown, an appropriate regulatory measure designed to preserve a document which plays an important role in the administration of the Selective Service System. The statute is violated even if the document is destroyed in privacy, with no intention of expressing protest or making any kind of communication whatever. Nor is this a case like *Wood* v. *Georgia,* 370 U.S. 375, and *Thomas* v. *Collins,* 323 U.S. 516, where the act being punished is pure verbal expression. Whatever may be this Court's standard with respect to pure speech, it is clear that the court below accurately reflected the test which has been applied to "conduct * * * intertwined with expression and association." *Cox* v. *Louisiana,* 379 U.S. 559, 563. See, *e.g., Adderley* v. *Florida,* No. 19, this Term, decided November 14, 1966.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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